



1 1997); *United States v. Stoddard*, 111 F.3d 1450, 1457, 58 (9th Cir. 1997); *United States v. James*, 109  
2 F.3d 597, 599 (9th Cir. 1997). A similar principle applies to claims of res judicata. *See United States*  
3 *v. Castiglione*, 876 F.2d 73, 75 (9th Cir. 1988).

4 Where an interlocutory claim is immediately appealable, its filing divests the district court of  
5 jurisdiction to proceed to trial. *See Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992); *United States*  
6 *v. Claiborne*, 727 F.2d 842, (9th Cir. 1984) (“Ordinarily, if a defendant’s interlocutory claim is  
7 considered immediately appealable under *Abney*, the district court loses its power to proceed from the  
8 time the defendant files its notice of appeal until the appeal is resolved”); *Moroyoqui v. United States*,  
9 570 F.2d 862, 864 (9th Cir. 1977).

10 In the analogous context of interlocutory appeals of denials of qualified immunity, the Ninth  
11 Circuit has held that “[s]hould the district court find that the defendants’ claim of qualified immunity  
12 is frivolous or has been waived, the district court may certify, in writing, that defendants have forfeited  
13 their right to pretrial appeal, and may proceed with trial.” *Chuman*, 960 F.2d at 105; *see also California*  
14 *ex rel. Lockyer v. Mirant Corp.*, 266 F. Supp. 2d 1046, 1052 (N.D. Cal. 2003) (explaining and applying  
15 *Chuman* certification process). “In the absence of such certification, the district court is automatically  
16 divested of jurisdiction to proceed with trial pending appeal.” *Chuman*, 960 F.2d at 105.

17 The terminology of whether an appeal is frivolous or is colorable is not settled, but the essence  
18 of the various linguistic formulations is the same. *See, e.g., Neitzke v. Williams*, 490 U.S. 319, 325  
19 (1989) (an appeal on a matter of law is frivolous where none of the legal points are arguable on their  
20 merits); *In re George*, 322 F.3d 586, 591 (9th Cir. 2003) (citation omitted) (“An appeal is frivolous if  
21 the results are obvious, or the arguments of error are wholly without merit”).

22 The closest jurisprudence is the denial of motions to dismiss indictments based on claims of  
23 double jeopardy. In this context, the Ninth Circuit has declared that “[a] double jeopardy claim is  
24 colorable if it has ‘some possible validity.’” *United States v. Zone*, 403 F.3d 1101, 1104 (9th Cir. 2005)  
25 (quoting *United States v. Sarkisian*, 197 F.3d 966, 983 (9th Cir. 1999)). Under that lenient standard,  
26 Bhatia’s appeal, while weak, is colorable. A written finding that Bhatia’s appeal is frivolous is therefore  
27 not warranted. Accordingly, the Court will stay these proceedings until the Ninth Circuit issues its  
28

1 mandate on the appeal.

2 Turning then to the intervening time that such an appeal will take, the delay resulting from this  
3 interlocutory appeal is excluded with respect to defendant Bhatia under 18 U.S.C. § 3161(h)(1)(E) of  
4 the Speedy Trial Act. The time during the pendency of this appeal is excluded with respect to Bhatia's  
5 co-defendants pursuant to 18 U.S.C. § 3161(h)(7). "[D]elay resulting from an interlocutory appeal" is  
6 excludable under the Speedy Trial Act. *See* 18 U.S.C. § 3161(h)(1)(E). When one defendant is granted  
7 an interlocutory appeal, and therefore is entitled to excludable delay pursuant to 18 U.S.C. §  
8 3161(h)(1)(E), excludable delay applies to properly joined co-defendants by virtue of 18 U.S.C. §  
9 3161(h)(7), which states:

10 (h) The following periods of delay shall be excluded in computing the time within which  
11 an information or an indictment must be filed, or in computing the time within which the  
12 trial of any such offense must commence:

13 . . . .

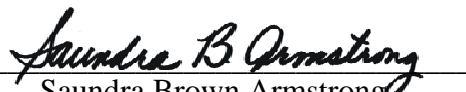
14 (7) A reasonable period of delay when the defendant is joined for trial with a  
15 codefendant as to whom the time for trial has not run and no motion for severance has  
16 been granted.

17 *See Unites States v. Bascue*, 1994 WL 41343, at \*1 (D. Or. 1994).

18 It is further ORDERED that the pre-trial conference scheduled for October 2, 2007, at 11 A.M.  
19 is VACATED. A status conference is set for December 18, 2007, at 9 A.M.

20 IT IS SO ORDERED.

21 September 25, 2007

22   
23 Sandra Brown Armstrong  
24 United States District Judge  
25  
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